



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

HD:hd
Docket No: 02560-98
16 September 1999

From: Chairman, Board for Correction of Naval Records
To: Secretary of the Navy

Subj: CDR [REDACTED] USN (RET), [REDACTED];
REVIEW OF NAVAL RECORD (SECOND RECONSIDERATION)

Ref: (a) Title 10 U.S.C. 1552

Encl: (1) DD Form 149 dtd 27 Jan 98 w/co-counsel's brief
(2) Case Summary Update dtd 14 Sep 99 w/encl (2) and
Addendum dtd 15 Sep 99
(3) BCNR files on Subject's prior cases (158-93, 5901-93 and 7450-95)
(4) PERS-OOJ memo dtd 9 Sep 99
(5) Certified true copy of Subject's medical record
(6) Subject's naval record

1. Pursuant to the provisions of reference (a), Subject, hereinafter referred to as Petitioner, filed enclosure (1) with this Board requesting, in effect, the following relief:

- (1) Clear his military and medical record of all adverse actions taken as a result of racially discriminatory treatment by his former reporting senior in her capacity as Commander, Naval Computer and Telecommunications Command.
- (2) Insert in his military record a "fair, accurate, and just" fitness report for 1 September 1991 to 20 July 1992.
- (3) Recognize his performance as Commanding Officer, Naval Computer and Telecommunication Station Japan with an appropriate end of tour award.
- (4) Return him to active duty in an appropriate command position.
- (5) Award him back pay and allowances to 1 September 1995.
- (6) Promote him to captain with back pay and allowances to 1 September 1995. In the alternative, he "...would accept a special promotion board that would be apprised of the racial discrimination he suffered so that the gaps in his record could be properly explained and he could be more fairly considered for promotion to Captain."

- (7) Restore his access to Sensitive Compartmental Information (SCI) "...that was revoked due to the unsupported actions of his former reporting senior."
- (8) Extend his statutory period of service for another three years.
- (9) Convey a letter of apology from the Secretary of the Navy to him and his family to include the following:

Acknowledgment of his vindication from false accusations and racially discriminatory treatment as supported by his "Not Guilty" Special Courts [sic]-Martial verdict, disapproved DFC [detachment for cause], clean mental health evaluation, retention of a Top Secret Security Clearance, and other actions taken by various impartial tribunals.

Expression of empathy to [his] family for enduring the humiliation and sustained irreparable damage suffered by false charges, racial discrimination, disparate treatment, and egregious conduct; the adverse impact and injustice depriving [him] of promotion, earnings, and earning capacity.

- (10) In the alternative, return him to active duty in the grade of captain, retroactive to 1 September 1995, with appropriate back pay and allowances, and with immediate retirement as a captain after his military and medical records have been cleared. In this regard, he requested an appropriate, dignified retirement ceremony acknowledging the damages he has suffered.
 - (11) Award attorney fees in connection with his court proceedings.
2. The Board, consisting of Messrs. Cali and Pfeiffer and Ms. Davies, reviewed Petitioner's allegations of error and injustice on 15 September 1999, and pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, naval records, and applicable statutes, regulations and policies.
 3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:
 - a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.
 - b. Enclosure (1) was filed in a timely manner.
 - c. By order of 19 March 1997, the United States District Court for the District of Columbia, Civil Action 95-1631 (SS), remanded Petitioner's case to the Board "...for its consideration of the new evidence that has been produced during discovery which suggests

that a substantial injustice or material error may have been done to [Petitioner]..."

d. Enclosure (2) summarizes the facts and issues involved in Petitioner's current and previous cases considered by the Board, docket numbers 5901-93 and 7450-95. Enclosure (3) contains the Board's files on those cases and docket number 158-93, which was closed without Board action as Petitioner had not exhausted his administrative remedies connected with his complaint under Article 138, Uniform Code of Military Justice (UCMJ).

e. Petitioner was involuntarily retired on 1 September 1995 under title 10, United States Code, section 6383 on the basis of his status as a regular officer of the Navy designated for limited duty, in the grade of commander, having completed 35 years of active naval service, and not having been on a list of officers recommended for promotion to captain.

f. When Petitioner was on active duty, he was investigated by the Defense Investigative Service, his command's inspector general (IG), and the Naval Criminal Investigative Service (NCIS). They found evidence of misconduct by Petitioner, specifically, security violations, violations of standards of conduct, and sexual harassment. An NCIS polygraph examiner concluded that Petitioner had been deceptive in questioning about removal of classified material from authorized spaces. In April 1992, his command recommended that he be the subject of nonjudicial punishment proceedings under Article 15 of the UCMJ, concerning the charges against him of violation of standards of conduct and sexual harassment. He exercised his right to demand a trial by court-martial. In September 1992, he was acquitted. In March 1992, the Commander, Naval Computer and Telecommunications Command, Petitioner's reporting senior who gave him an adverse fitness report for 1 September 1991 to 20 July 1992, requested his detachment for cause (DFC) from his position as a commanding officer. In October 1992, after his court-martial acquittal, the Chief of Naval Personnel disapproved the DFC; however, he was not restored to his former position as a commanding officer. In February 1992, his reporting senior also referred him to the National Naval Medical Center (NNMC), Bethesda for a psychiatric evaluation. According to the NNMC medical board report of 20 March 1992, his command referred him because of "...his superiors' concerns about [his] apparent difficulty concentrating and inappropriate responses during the [IG] investigation." The medical board found that he had a "Bi-Polar Disorder, Manic Episode, with mood-incongruent psychotic features." They concluded that he was unable to return to full duty. The addendum of 10 April 1992 concluded he was incompetent to stand trial. On 1 May 1992, he was found competent to stand trial. Later independent physical and psychiatric evaluations from the Walter Reed Army Medical Center found him fit for full duty. In April 1992, his SCI access was revoked on the basis of alleged security violations, for which he was never brought to trial, and other charges of which he was acquitted at his court-martial.

g. As a result of favorable action on Petitioner's Article 138 complaint, which did not involve this Board, his fitness report for 1 September 1991 to 20 July 1992 was removed, and his name was removed from the list of officers recommended for early retirement by the Fiscal Year (FY) 93 Selective Early Retirement Board. He then failed of selection by the FY

95 Line Captain Selection Board. In docket number 5901-93 the Assistant Secretary of the Navy (Manpower and Reserve Affairs), acting on 22 November 1994, approved this Board's unanimous recommendation, reflected in their report of proceedings dated 2 November 1994, to remove his FY 95 failure. The basis for this recommendation was that his record before the promotion board had included prejudicial documentation, which the Board found to warrant removal, concerning the revocation of his SCI access (the minority recommendation to remove both such documents was approved); and the promotion board had included a member who had been on the FY 93 SERB which selected Petitioner for early retirement, and which had before it the adverse fitness report that was later removed. Also approved was the Board's unanimous recommendation to deny his requests to grant him consideration by a special selection board for the FY 95 Line Captain Selection Board, and remove from his medical record all records of psychological and psychiatric information dating from 18 February 1992 to present. The basis for the recommendation against a special selection board was that "...placing him before a regular board with a corrected record and status as an officer who has not previously failed will provide him adequate relief." Regarding the matter of SCI access, the Board stated that they "...do not consider it a matter within their purview to determine whether a servicemember should be granted such access," however, the majority found that "...the evidence of Petitioner's misconduct, including security violations, was sufficient to support denying him access to SCI in order to protect national security, notwithstanding his acquittal of some of the charges against him by a court-martial."

h. The letter of 13 January 1995 from the Assistant Secretary of Defense to Petitioner's counsel, a copy of which is at Tab A to the file on docket number 7450-95 at enclosure (3), stated that Petitioner's record was flagged by the Bureau of Naval Personnel (BUPERS) Retirement, Fleet Reserve and Temporary Disability Division (Pers-27) to track his August 1992 medical board, and that this flag was removed on 20 December; that the flag placed on his record by the BUPERS Personnel Security Division (Pers-81) would be removed consistent with the decision to remove the documents concerning revocation of his SCI access; and that he had not been assigned command per the Naval Military Personnel Manual, Article 3410105 by reason of his pending retirement in September 1995. The letter further stated that if Petitioner's commanding officer deemed it necessary for him to have access to SCI, that officer would submit a request to the Department of the Navy Central Adjudication Facility (DON CAF) for reinstatement; and that if such request were approved, the security flag would be removed.

i. Petitioner also failed of selection by the FY 96 Line Captain Selection Board, convened on 10 January 1995. In docket number 7450-95, the letter to Petitioner from the Acting Assistant Secretary of the Navy (Manpower and Reserve Affairs) dated 11 January 1996 approved this Board's unanimous decision of 14 December 1995 to deny his new request that his involuntary retirement be set aside and that he be returned to active duty, as well as his request to reconsider granting him a special selection board for FY 95. BUPERS provided the Board advisory opinions to the effect that his record as presented to the FY 96 promotion board had been properly corrected in accordance with the action approved in docket number 5901-93, and that his retirement on 1 September 1995 was

proper, in that it was not triggered by the FY 95 failure, but rather by Petitioner's 35 years of active naval service and the fact he was not on the list of officers recommended by the FY 96 board. The Board substantially concurred with the advisory opinions. Petitioner complained, in part, that several unspecified educational achievements as an officer had been moved to his enlisted record and, therefore, may not have been considered. Since he had not specified the educational achievements of concern, the Board could not determine whether they had been misfiled, whether the FY 96 promotion board had other evidence of the achievements, or whether the achievements were significant enough to affect his competitiveness for promotion. They further noted that when he corresponded with the promotion board, as the BUPERS memorandum of 7 September 1995, attached to their advisory opinion of 17 November 1995, indicates he did, he could have provided information about these achievements. Tab B to the file on docket number 7450-95 at enclosure (3) is a copy of the letter of 5 January 1995 from Petitioner to the FY 96 Line Captain Selection Board, by which he forwarded seven enclosures not recorded in his microfiche record. The Board did not have this documentation when they considered his case, but it was forwarded on 4 January 1996 for consideration by the Office of the Secretary of the Navy in their review of the Board's decision. Petitioner now specifies the achievements in question (page 28 of brief at enclosure (1), footnote 7). Since the Board was unable to find he had been denied fair consideration by the FY 96 promotion board, they had no basis to recommend reversing the previous decision to deny his request for a special selection board for FY 95.

j. The brief at enclosure (1) from Petitioner's two attorneys presents substantial new evidence indicating that he was the victim of racial discrimination by the officer who gave him the adverse fitness report, requested his DFC, and referred him for a psychiatric evaluation. This is the evidence that prompted the court to remand the case to this Board. Co-counsel say that the basis for the current application is the racially discriminatory treatment that pervaded the process Petitioner endured, and was part of a pattern of such treatment of minority officers by that officer; and that the heart of the petition is that the Navy's failure to follow its own regulations by not restoring Petitioner to a command position after his DFC had been disapproved denied him due process and prevented him from being made whole. Citing what they call the "political nature" of the case, co-counsel request that Petitioner be allowed to retire as a captain. In support of his alternative request for a special selection board, they argue that the regular promotion boards did not know of the racial discrimination Petitioner had suffered, and that the gaps in his record, particularly his not having served in a command position after the disapproval of his DFC, were not properly explained.

k. In correspondence attached as enclosure (4), PERS-00J, the Special Assistant for Minority Affairs to the Chief of Naval Personnel, has recommended that Petitioner be granted a special selection board, stating that he "...may have been subjected to unfair treatment by his command" and that his record "...remained tarnished and possibly affected his opportunities for promotion..." The matters identified as having "tarnished" his record are information pertaining to his psychological state, specifically, the diagnosis of bi-polar disorder; and the revocation of his SCI access. PERS-00J states that information pertaining

to his psychological state should be removed from his record before his consideration by the special selection board. PERS-00J also recommends that his "clearance reflect accurate information," and submits that if this is beyond the scope of the Board's authority, the Board should make this recommendation to the DON CAF.

1. Enclosure (5) is a certified true copy of Petitioner's medical record; enclosure (6) is his official microfiche service record. Neither reflects any adverse material.

m. Paragraph 6.b of Secretary of the Navy Instruction (SECNAVINST) 1401.1B states "A special selection board will not be convened to consider any officer who, through the exercise of reasonable diligence, might have discovered and corrected the error or omission in the official record prior to convening the promotion selection board that considered, but did not select the officer."

CONCLUSION:

Upon review and consideration of all the evidence of record, the Board finds the existence of an injustice warranting partial relief, specifically, granting him consideration by a special selection board for the FY 95 Line Captain Selection Board.

The Board now finds that Petitioner should have a special selection board for the FY 95 Line Captain Selection Board in view of the new evidence showing he was the victim of racial discrimination. They have previously found he did not have fair consideration by the FY 95 promotion board, and they feel the additional remedy of granting him a special selection board is warranted in light of the discriminatory treatment he has had to endure. If he is promoted pursuant to selection by the special selection board, he may ask this Board to reconsider his request to return him to active duty with back pay and allowances to 1 September 1995.

In finding that Petitioner should have a special selection board, they agree with the PERS-00J advisory opinion at enclosure (4) that he may have been subjected to unfair treatment by his command. However, they do not accept the suggestion that he rated a special selection board because of information pertaining to his psychological state, specifically, the diagnosis of bi-polar disorder; or the revocation of his SCI access. The opinion states that information pertaining to his psychological state should be removed from his record before his consideration by the special selection board, and recommends that his "clearance reflect accurate information." Paragraph 3.1 above reflects the Board could find no adverse material in his military or medical records, so they could not find such material harmed his chances for promotion. They are likewise unable to find his not having SCI access reflects other than accurate information. In this regard, they note the majority finding in their report of 2 November 1994, docket number 5901-93, that "...the evidence of Petitioner's misconduct, including security violations, was sufficient to support denying him access to SCI in order to protect national security, notwithstanding his acquittal of some of the charges against him by a court-martial."

The Board likewise does not accept the argument of co-counsel that Petitioner should have consideration by a special selection board because the regular promotion boards were missing information about racial discrimination he may have suffered, or because they were missing information about gaps in his record. They find he was free to provide information about any discrimination he encountered, and to provide any missing information about his performance or his not having been in a command position. They observe, in this regard, that he did correspond with the FY 96 promotion board. They further note that because he did not avail himself of his opportunity to provide the missing information on which co-counsel base their argument for a special selection board, he did not satisfy the due diligence requirement of SECNAVINST 1401.1B for a special selection board to be granted on that basis.

The Board does not recommend a special selection board for FY 96, since they remain unconvinced of any defect in his consideration by the FY 96 Line Captain Selection Board. While Petitioner has now clarified which items he contends were improperly filed in his enlisted record, the Board again notes that he could have provided information about these matters when he corresponded with the promotion board.

As stated previously, the Board finds no adverse material to remove in either Petitioner's military or medical records.

They are unable to determine what marks and comments would give Petitioner a "fair, accurate, and just" fitness report to replace the report for the same period which was removed as a result of his successful Article 138 complaint.

They are likewise unable to determine what, if any, end of tour award he deserved, or how an accompanying citation should be worded.

They again find he should not be returned to active duty, since they again find he was properly involuntarily retired on 1 September 1995 under title 10, United States Code, section 6383 on a basis not involving his now removed failure by the FY 95 Line Captain Selection Board. Since they did not conclude he should be returned to active duty, they have no need to decide whether the Navy should be required to place him in a command position.

Since the Board has not concluded Petitioner should be returned to active duty or promoted to captain, they find he has no entitlement to back pay.

They are unable to conclude Petitioner should be promoted to captain, absent selection by a promotion board. In this connection, they note all the allegations he has raised of matters which he feels have denied him fair consideration for promotion, some of which were acknowledged as having merit in the decision to remove his failure by the FY 95 promotion board. However, even with the assumption that he was correct as to all the matters raised, they are not persuaded that eliminating these matters would have made it probable that he would have been selected for promotion by a duly constituted board of officers.

Concerning Petitioner's request for restoration of access to SCI, the Board's majority finding quoted above is pertinent. They also note that the letter of 13 January 1995 from the Assistant Secretary of Defense informed his counsel that if his commanding officer deems it necessary for him to have such access, that officer would submit a request for reinstatement to the DON CAF. At such time as he may be performing duty for the Department of the Navy that requires access to SCI, he may ask the appropriate superior to request his reinstatement.

The Board finds no authority to extend Petitioner's service beyond his statutorily mandated retirement date of 1 September 1995.

They recognize that the facts of Petitioner's case, including the injustices which have been acknowledged previously, might well warrant an apology from the Secretary of the Navy. Without deciding whether the issuance of an apology is a remedial action within their purview, they find no evidence that Petitioner has exhausted his administrative remedies by submitting directly to the Secretary his request for an apology.

Since the Board has not concluded Petitioner should be returned to active duty or promoted, they have no need to decide the merits of his alternative request for return to active duty as a captain with immediate retirement.

The Board finds no authority to award attorney fees.

In view of the above, the Board recommends the following limited corrective action:

RECOMMENDATION:

- a. That Petitioner be considered by a special selection board for the FY 95 Line Captain Selection Board.
- b. That any material or entries inconsistent with or relating to the Board's recommendation be corrected, removed or completely expunged from Petitioner's record and that no such entries or material be added to the record in the future.
- c. That any material directed to be removed from Petitioner's naval record be returned to the Board, together with a copy of this Report of Proceedings, for retention in a confidential file maintained for such purpose, with no cross reference being made a part of Petitioner's naval record.
- d. That the remainder of Petitioner's request be denied.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

ROBERT D. ZSALMAN
Recorder

Jonathan S. Ruskin
JONATHAN S. RUSKIN
Acting Recorder

5. The foregoing report of the Board is submitted for your review and action.

W. Dean Pfeiffer
W. DEAN PFEIFFER

Reviewed and approved:

Carolyn H. Becraft

CAROLYN H. BECRAFT
04 NOV 1999
Assistant Secretary of the Navy
(Manpower and Reserve Affairs)
Special selection board for FY 95 Line Captain Selection Board is approved:

Richard Danzig
Richard Danzig
Secretary of the Navy

12 November 1999



2560-98

DEPARTMENT OF THE NAVY
CHIEF OF NAVAL PERSONNEL
WASHINGTON, D.C. 20370-5000

IN REPLY REFER TO

9 September 1999

MEMORANDUM FOR EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BCNR PETITION ICO CDR [REDACTED] USN,
[REDACTED]

Ref: (a) BCNR(PERS-00Z) memo of 29 July 99

Encl: (1) BCNR PETITION ICO CD [REDACTED] USN

1. Reference (a) requested PERS-00J comment on the BCNR petition of Commander [REDACTED] concerning circumstances contributing to his failure to select for Captain.

2. Commander [REDACTED] case has been re-opened by court order. Per enclosure (1), the following information supports the PERS-00J opinion:

- Jun 87-Jul 90 - CDR [REDACTED] as CO, CNTC Key West, Florida
- Jun 90 - CAPT [REDACTED] assumed command of CNCTC
- Jul 90 - CDR [REDACTED] assumes command of NCTC Yokosuka, Japan
- Nov 91 - Hotline call reveals allegations of misuse of government property and base personnel by CDR [REDACTED]. During investigation of Hotline complaint, sexual harassment of a junior officer was also introduced. Formal disciplinary charges (13) were brought against CDR [REDACTED]
- Jan 92 - CDR [REDACTED] was relieved of command and Detachment for Cause (DFC) was ordered by [REDACTED].
- Feb 92 - Psych evaluation was ordered by CAPT [REDACTED] against CDR [REDACTED]. Evaluation concluded that CDR [REDACTED] demonstrated bi-polar disorder and was labeled paranoid and delusional. CD [REDACTED] was confined to the hospital for 3 weeks.
- Mar 92 - A separate psych evaluation revealed that CDR [REDACTED] did not demonstrate bi-polar disorder.
- Apr 92 - CAPT [REDACTED] pursued Med Board process against [REDACTED]. [REDACTED] underwent hearing - competency to stand trial. He was found to be competent by the hearing board. [REDACTED] SCI clearance was removed.
- Sep 92 - [REDACTED] was acquitted by Special Court Martial of all 13 charges brought against him.
- Oct 92 - DFC was overturned by CNP.

- Nov 92 - Adverse fitness report was presented to CDR [REDACTED] (period ending 20 Jul 92). [REDACTED] selected for early retirement via Selection for Early Retirement Board (SERB).
- Dec 92 - [REDACTED] filed Article 138 directed against CAPT [REDACTED].
- Jan 93 - O-6 selection board meets [REDACTED] fails to select).
- Feb 93 - [REDACTED] is ordered by BUMED to undergo psych evaluation. Evaluation revealed no evidence of bi-polar disorder - fit for duty.
- May 93 - BCNR granted partial relief of Article 138. Adverse fitness report was ordered removed. [REDACTED] name was ordered removed from SERB list. [REDACTED] request for a Special Board was denied.
- Jan 94 - O-6 selection board meets [REDACTED] fails to select). [REDACTED] appeals non selection to BCNR. Member of O-6 board was also member of [REDACTED] SERB board. [REDACTED] was informed that his record would go before the next O-6 board as though it was his first look.
- Oct 94 - [REDACTED] discovered medical board information as well as revocation of SCI clearance were still part of his official record as flags. [REDACTED] petitions BCNR to have SCI letter and medical board info removed from his record.
- Jan 95 - O-6 selection board meets [REDACTED] fails to select).
- Jun 95 - [REDACTED] requests a special promotion board through BCNR. [REDACTED] informed BCNR of missing documents from his officer record that should have been available for the Jan 95 O-6 selection board.
- Sep 95 - [REDACTED] as involuntarily separated.

3. Commande [REDACTED] and his counsel, contends that he could not have received a fair review during the selection board processes because there were gaps in his record and that same record was flagged. He contends that the medical flag was the result of a Navy mental health evaluation ordered by his command. Commande [REDACTED] believed that evaluation was unwarranted and inaccurate. Additionally, he had a civilian mental health evaluation (and a second opinion evaluation performed by Walter Reed Army Medical Center) performed that contradicted the Navy evaluation. The other flag was for the removal of his Special Compartmented Information (SCI) clearance based on the investigation and subsequent Special Court Martial.

4. It is my understanding that CDR [REDACTED] is specifically requesting to be returned to active duty, that he be promoted to O-6, and that his official officer record be corrected by removal of the bi-polar disorder and SCI clearance information.

5. Opinion.

a. Based on the information that has been made available to me (summarized above), it is my opinion that CDR [REDACTED] may have been subjected to unfair treatment by his command. His selection to command twice reflects an officer whose record was highly competitive prior to his receipt of an adverse fitness report. Having the original allegations of government property and people misuse lead into 13 formal and separate charges of misconduct leaves me suspect of a possible hidden motive or agenda to target [REDACTED]. The actions that shortly followed (DFC, Psych Evaluation, Relieved of Command, PCS order during the DFC process), taken by the command, also lend credence to my opinion. Even though CDR [REDACTED] was acquitted of all 13 charges brought against him via Special Court Martial, and even though CNP overturned the command's request to have CDR [REDACTED] DFC, and even despite the opposing diagnosis of bi-polar disorder (which led to [REDACTED] subsequent SCI revocation), his record remained tarnished and possibly affected his opportunities for promotion.

b. PERS-00J recommends that Commande [REDACTED] be granted a special selection board. If granted, that information pertaining to his psychological state should be removed from his record prior to subject board. CDR [REDACTED] also requests restoration of his SCI clearance. I recommend that his clearance reflect accurate information. This would ensure that he has no difficulty in gaining future civilian employment that may require such clearance. If this is beyond the scope of BCNR authority, this recommendation should be made to DONCAF by BCNR [REDACTED]

[REDACTED]
Commander, U.S. Navy
Special Assistant for
Minority Affairs (PERS-00J)